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Gowan for Appts.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 415.

THE NEW YORK INDIANS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF THE APPELLANTS.

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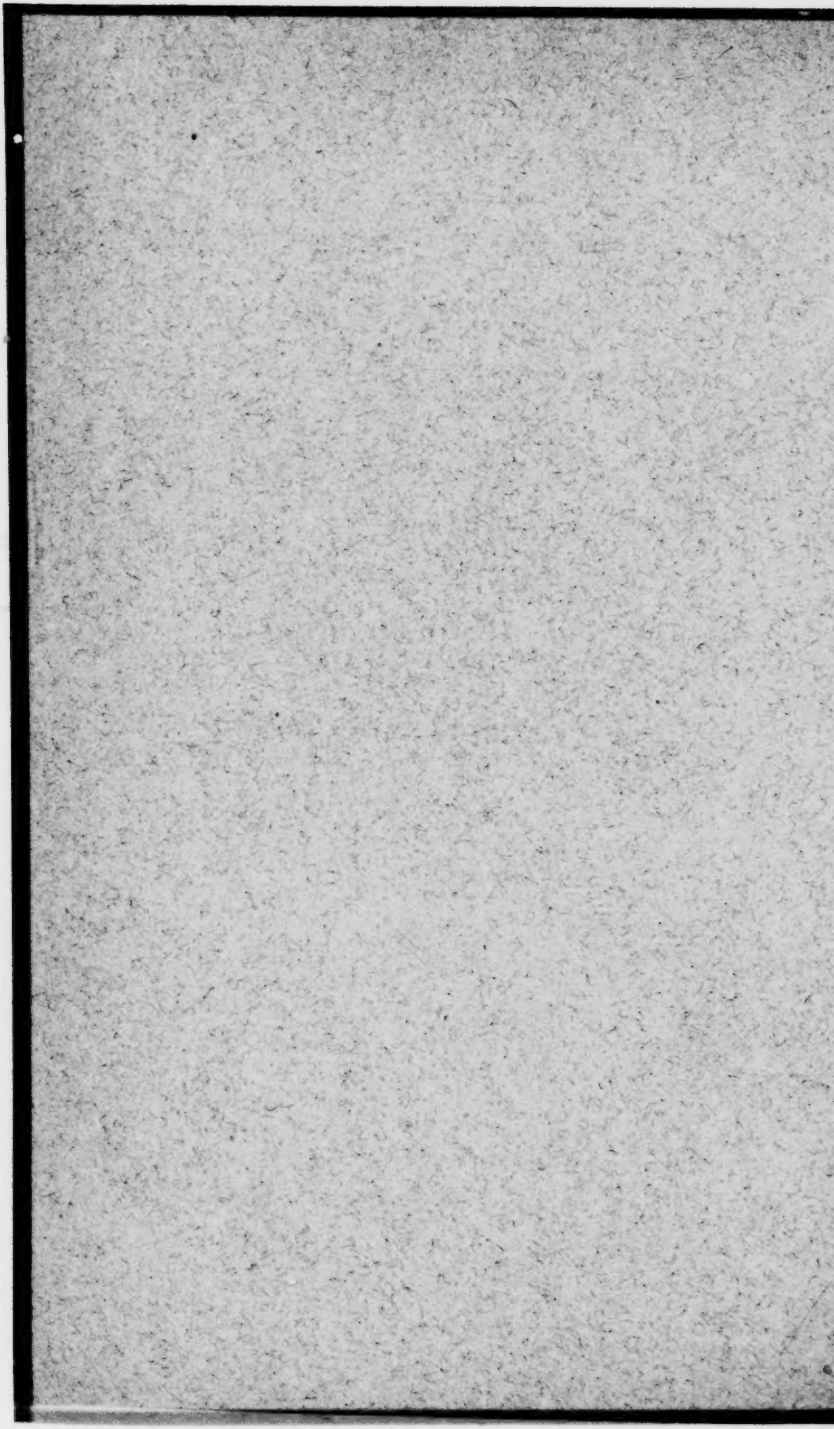

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I.

STATEMENT OF THE CASE.

On January 15, 1838, the United States made with the New York Indians the treaty known as the treaty of Buffalo Creek. (7 Stats., 550.)

The Indians claim that the United States violated this treaty, and on January 21, 1884, the claims of the Indians in the premises were referred under the "Bowman act," so called (act of March 3, 1883), to the Court of Claims. That court reported its findings to the Senate January 16, 1892, and thereupon, on January 28, 1893, Congress passed the act under which the claims are now to be considered, namely,

"An act to authorize the Court of Claims to hear and determine the claims of certain New York Indians against the United States." (Rec., 4, 5.)

This act conferred upon the Court of Claims jurisdiction "to hear and enter up judgment, as if it had original jurisdiction of said case, the claim of the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th day of January, 1838, against the United States, growing out of the alleged unexecuted stipulations of said treaty on the part of the United States."

The material facts, as found by the Court of Claims, are as follows (Rec., 7 to 24):

The Indians described in the jurisdictional act are the Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay, Wisconsin, and on the Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American Party of the St. Regis residing in the State of New York, Stockbridges, Munsees, and Brothertowns. These Indians are, in legal effect, the well-known Six Nations.

Certain of the New York Indians between the years 1810 and 1816 petitioned for permission to purchase reservations of their Western brethren and to remove to and occupy the same, and, consent being given, the United States aided some of the Indians representing the claimants in exploring certain parts of Wisconsin with a view to the immigration thither of such of the Six Nations as might choose to go; and on August 18, 1821, the Menomonee and Winnebago nations of Indians, for a valuable consideration, ceded to the Six Nations and the St. Regis, Stockbridge, and Munsee tribes certain lands near Green Bay, Wisconsin, amounting to about 500,000 acres. The President of the United States approved this cession.

Permission to secure an extension of this cession was duly given, and thereafter, on September 23, 1822, the Menomonees, for a valuable consideration, made a similar cession of another tract of land, containing at least five million acres, to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee Indians; the grantees promising that the grantors should have free permission and privilege of occupying and residing upon the lands in common with the former. This latter cession was duly approved, on the understanding, however, that the lands were to be held by the grantees in the same manner as they were held by the grantors previous to the grant, and that the title of the grantees should not interfere in any way with the lands previously occupied by the Government of the United States or its citizens. On October 27, 1823, the Secretary of War officially notified the grantees that the President wished them to understand that by this partial sanction he did not mean to interfere with or in any manner invalidate their title to all the lands acquired, but that, on the contrary, he considered their title to every part of the lands conveyed to them by the grantors as equally valid as against them, and that what they had done was with the full sanction of the Government. The grants above mentioned include the lands subsequently ceded by the Menomonees to the United States by the treaties of August 11, 1827, and February 8, 1831.

Thereafter some of the New York Indians removed to and took possession of the lands in Wisconsin. Later, and after 1832, another small portion of the New York Indians removed to those lands. March 14, 1840, the Senecas denied ownership of the Wisconsin lands, stating that they determined to have no other home than that of their fathers, where they then resided, and in May and September following, in petitions to the President and Senate and House of Representatives, the council of the Senecas denied that they were parties to the treaty of 1838. It does not appear that application was made by the tribes or bands or any of them

for removal to the Kansas lands provided for in the Buffalo Creek treaty except as hereinafter appears, and it does not appear that any substantial number of Indians, other than those who made up the Hogeboom party hereinafter mentioned, desired to go to Kansas.

In the year 1838, at the time of the negotiation of the treaty of Buffalo Creek, the Senecas, Onondagas, Oneidas, Cayugas, Tuscaroras, and St. Regis tribe each possessed a certain reservation in the State of New York on which numbers of those tribes resided and the right of occupancy of which was secured to them by treaty stipulations. The Cayugas had no separate reservation of their own in New York, but made their home with and resided upon the reservations possessed by the Senecas. This they did with the consent of the Senecas, and a portion of the Onondagas did the same. The lands occupied by the Senecas in New York consisted of four separate and distinct reservations containing in all one hundred and fourteen thousand eight hundred and sixty-nine acres, and the lands occupied by the Tuscaroras, Onondagas, Oneidas, and St. Regis Indians aggregated in amount twenty-seven thousand nine hundred and forty-nine acres, making the total of lands occupied by the New York Indians in New York one hundred and forty-two thousand eight hundred and eighteen acres. For many years prior to the treaty of Buffalo Creek the Indians residing in New York had improved and cultivated their lands, on which they resided, and from the products of which they chiefly sustained themselves. (The treaty of Buffalo Creek, as printed in 7 Stats., contains a misprint on the third line of page 556. The word "Oneidas" is in the original treaty "Onondagas," the whole line reading, "Onondagas residing on the Seneca reservation.")

While the treaty of Buffalo Creek was under consideration by the Senate various amendments thereto were made by that body, which, in the end, by a two-thirds vote, adopted the following resolution:

"That whenever the President of the United States shall be satisfied that the assent of the Seneca tribe of Indians has been given to the amended treaty of June 11, 1838, with the New York Indians according to the true intent and meaning of the resolution of the Senate of the 11th of June, 1838, the Senate recommend that the President make proclamation of the said treaty and carry the same into effect."

Thereafter and on April 4, 1840, the President proclaimed the treaty as found in 7 Stats. (with the correction above indicated), reciting, in his proclamation, a resolution of the Senate of March 25, 1840, "that, in the opinion of the Senate, the treaty between the United States and the Six Nations of New York Indians, with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved by all said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation;" and the proclamation in terms used the following language:

"Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do, in pursuance of the resolutions of the Senate of the 11th of June, one thousand eight hundred and thirty-eight, and the 25th day of March, one thousand eight hundred and forty, accept, ratify, and confirm said treaty and every article and clause thereof."

For convenience at this point the essential terms of the treaty, as summarized in the petition (Rec., 1, 2), are given as follows:

On the 15th day of January, A. D. 1838, at Buffalo Creek, in the State of New York, there was concluded between the claimants and the United States a treaty known as the treaty of Buffalo Creek, wherein and whereby it was provided, in consideration of the premises therein recited and of the covenants contained in the treaty itself to be per-

formed by the United States, that the claimants ceded and relinquished to the United States all their right, title, and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin, and in consideration of such cession and relinquishment the United States in and by said treaty agreed and guaranteed as follows:

First. To set aside as a permanent home for all of the claimants a certain tract of country west of the Mississippi river, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (1,824,000) acres of land, the same to be divided among the different tribes, nations, or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in the certain schedule annexed to the said treaty, and designated as Schedule A, on condition that such of the claimants as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest to the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Thirdly. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourthly. The United States agreed to pay to the several tribes or nations of the claimants, hereinafter mentioned, on their removal West, the following sums, respectively, namely, to the St. Regis tribe, five thousand dollars ($5,000); to the Seneca nation, the income annually of one hundred thousand dollars ($100,000), (being part of the money due said nation for lands sold by them in New York, and which sum they authorize to be paid to the United States); to the Cayugas, twenty-five hundred dollars ($2,500) in cash, and the

annual income of twenty-five hundred dollars ($2,500); to the Onondagas, two thousand dollars ($2,000) in cash, and the annual income of twenty-five hundred dollars ($2,500); to the Oneidas, six thousand dollars ($6,000) in cash, and to the Tuscaroras, three thousand ($3,000) dollars.

Fifthly. The United States agreed to appropriate the sum of four hundred thousand dollars ($400,000), to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country, if they so desired, but were exempted from obligation so to do.

The President of the United States never prescribed any time for the removal of the claimants, or any of them, to the lands, or any of them, set apart by the treaty of Buffalo Creek, further than is shown in these findings.

Many of the Indians have protested against any removal. The Onondagas have officially declared that they would not remove, and treaties subsequent to that of 1838 appear in the statutes in relation to the subject-matter. The Tuscaroras still occupy their reservation in New York.

After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with them, and the Tuscaroras continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs), that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was

ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. The Indian protests against the treaty were based upon the following allegations: (*a*) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes and put in motion by an agent of the pre-emption owners; (*b*) that a considerable majority of the Indians wished to remain in New York.

After the treaty of May 20, 1842, was ratified the lands and improvements on the Buffalo Creek reservation in New York were appraised, and the Indians thereon gradually withdrew to the Cattaraugus and Allegany reservations, in New York.

Prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration. It was not deemed expedient to enter into any arrangements for this purpose until the Department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

No provision was made for the actual removal of more than about 260 individuals of the claimant tribes, as contemplated by the treaty of Buffalo Creek and as shown below. Of this number, only thirty-two ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation and in con-

formity with such desire said Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

The sum of $9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians, under Hogeboom's direction, in 1846.

From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number seventy-three did not leave New York with the party; 191 only arrived in Kansas June 15, 1846; seventeen other Indians arrived subsequently; eighty-two died and ninety-four returned to New York.

It does not appear that any of the thirty-two Indians to whom allotments were made settled permanently in Kansas.

A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian Commissioner, to be held at Cattaraugus June 2, 1846, to learn the final wishes of the Indians as to emigration. The Commissioner, who was sent on the part of the United States, reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The Commissioner also reported that he held an enrollment for two full days, but that only seven persons requested to be enrolled for emigration, and these vouched for five more as willing to go.

The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor, except as in these findings shown to the contrary. The reservation to "the first Christian and Orchard parties of Oneida Indians," which was set aside for them by defendants at Green Bay, Wisconsin, contained 65,540 acres in number, all of which has been allotted in

severalty and reserved for school purposes, except 84.08 acres.

The Stockbridge Indians acquired a reservation in Wisconsin of 11,803 acres, some of which has been allotted in severalty (9 Stat. L., 955; 11 Stat. L., 663, 679; 16 Stat. L., 404). The United States never acquired any lands in the State of New York from the Indians of that State. The lands ceded in that State by the Indians thereof were ceded for consideration to the State or to the Ogden Land Company, so called. There may have been some small cessions to individuals, but there were none to the United States.

Upon the ratification of the Oneida treaty of February 3, 1838, the present Oneida reservation in Wisconsin was surveyed, containing about 65,000 acres. After the ratification of the treaty of Buffalo Creek the United States surveyed, made part of the public domain, and sold or otherwise disposed of the tract of land at Green Bay, the Indian title to which had been ceded by that treaty, except the said Oneida reservation. This was treated as if it had been the reservation excepted from the cession in article 1 of that treaty, which latter reservation was never surveyed, and the bounds of which as given in the said article are not the same as in the former reservation, although the two reservations cover for the most part the same ground and are of about the same area.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek have been since that treaty surveyed and made a part of the public domain and sold or otherwise disposed of by the United States, which received the consideration therefor, and the said lands were thereafter and now are included within the territorial limits of the State of Kansas.

The price realized by the United States for such of said lands as were sold was at the rate of $1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about $1.22 per acre.

By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of the release by that band of its claims under the treaties of 1838 and 1842, namely, its claims "to the lands west of the State of Missouri, and all right and claim *to be removed* thither, and for support and assistance after such removal, and all other claims against the United States under the aforesaid treaties of 1838 and 1842," (11 Stats., 736), agreed to pay and invest, and did pay and invest, for said band the sum of $256,000.

This sum of $256,000 was equivalent to one dollar per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to a part of the sum of $400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty. A portion of the fund, all of which was paid and invested as agreed, was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation in New York for the tribe's benefit, and the Tonawandas still reside thereon.

After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory, known as the New York Indian reserve, be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. Thirty-two New York Indians were found to be resident on the land, and allotments were made to them. After this and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860), some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting in the powers of attorney that the United States had seized upon the said lands, contrary to the obligations of said treaty,

and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims.

Of the sum of $400,000 agreed by the treaty of Buffalo Creek to be appropriated for the purposes mentioned therein the sum of $20,477.50 was appropriated, and of this $9,797.11 were expended, this expenditure being for the removal and subsequent care of the Indians who emigrated in 1846. Of this amount $1,034.50 were for shelter, supplies, medical attendance, etc., before the start, while the Indians were assembling; $5,800.29 for pay of agent for transportation and supplies on the way, and $2,962.32 for supplies, etc. (including $350 for medical attendance and supplies), after arrival.

The following payments were also made under the treaty:

Under article 9, $5,000 to the St. Regis tribe.

Under article 11 and Schedule C, $1,500 to William King, he having emigrated in 1846.

Under article 13, $6,000 to the chiefs of the first Christian and Orchard parties of the Oneidas in New York.

Under article 14 and Schedule B, $125 to James Cusic, he having emigrated in 1846.

The United States has performed its agreement as to the disposition of the money to be paid the Senecas by Ogden and Fellows, contained in article 10 of the treaty of 1838 as amended by the third provision of the treaty of 1842. Owing to non-emigration, the Indians have received the money in New York.

It does not appear that the President ever prescribed any time for the removal of the New York Indians to Wisconsin under the treaties of February 8, 1831, and October 27, 1832, or that the President prescribed any time for the removal of any New York Indians from Wisconsin and New York to the Kansas lands other than the Hogeboom party, as hereinbefore set forth.

There is evidence tending to show that at the time the Kansas lands were opened to settlement they had a value greater than the price received for them by the United States.

The following facts, agreed upon by both parties, are at their request found by the court:

It is hereby stipulated and agreed between the counsel representing the parties to this case that the Court find the following statement of facts, all of which are matters of history:

First. Prior to 1786 the title to and sovereignty over the lands then occupied by the New York Indians, except as to their right of possession under their Indian title, was claimed by the States of New York and Massachusetts respectively, and on December 16, 1786, Massachusetts ceded to New York the "government, sovereignty, and jurisdiction" over the disputed territory, while "the right of pre-emption of the soil from the native Indians" was divided territorially between the two States, New York acquiring an absolute right of pre-emption in a territory which included what afterwards became known as the Oneida, Onondaga, and St. Regis reservations, and Massachusetts acquiring a similarly absolute right in the territory which included what were afterwards known as the four Seneca reservations and the Tuscarora reservation.

The agreement by which the said concessions were made by the said parties is contained in an instrument in writing made and executed by and between the said States, at the city of Hartford, in the State of Connecticut, on the 16th day of December, in the year of our Lord 1786, a copy of which agreement is recorded in the office of the county clerk of the county of Cattaraugus, State of New York, in Liber One, at pages 270–280, to which record reference is here made, and either party is at liberty to read the whole or any part thereof on the hearing of this case. The Indian title and right of possession to a part of the said territory was after-

wards bought and extinguished by certain grantees of Massachusetts in the year 1789.

The pre-emption right and estate of Massachusetts in the remaining part of these lands was granted by the said State to Robert Morris, May 11, 1791, and by him to the trustees of the Holland Land Company in the year 1793, except as to the land known as the "Morris reserve," and from time to time the Indian title as to the various tracts was extinguished by these parties. But this relinquishment of the Indian title did not include the lands and reservations occupied by the Seneca and Tuscarora Indians mentioned and referred to in the treaty of 1838.

The Tuscaroras came from North Carolina prior to the Revolutionary war and formally united themselves with the confederacy of the New York Indians, known at that time as the Iroquois confederacy, and were assigned to and resided upon the territory of the Oneidas, and thereafter the Iroquois confederacy became known as the Six Nations; and prior to 1788 the Tuscaroras commenced a settlement by themselves on lands which they now occupy, located in the county of Niagara, and obtained an Indian title to 1,920 acres of land from the Seneca nation of Indians and the Holland Land Company.

In 1804 the Tuscaroras purchased with their own moneys 4,329 acres of land lying adjacent to the tract of land last mentioned, and they now own and occupy the last-mentioned tract in fee-simple; and the said two parcels of land comprise 6,249 acres of land mentioned and referred to in the eleventh finding of fact in Congressional case No. 151 as being occupied by the Tuscarora Indians.

In 1810 the Holland Land Company conveyed to David A. Ogden its estate and property in the Buffalo Creek, Cattaraugus, Allegany, Tonawanda, Tuscarora, and Caneadea reservation—in all, 196,335 acres—subject only to the right of the native Indians to occupy and possess the same under their Indian title.

On August 1, 1826, the Seneca nation sold to Thomas Ludlow Ogden and others, trustees of the Ogden Land Company, the Caneadea, Canawaugus, Squawky Hill, and Big Tree reservations and parts of the Buffalo Creek, Cattaraugus, and Tonawanda reservations and surrendered possession of the same; but this sale and surrender of lands did not include any of the lands and reservations mentioned and described in the treaty of 1838, and also in the eleventh finding of fact in Congressional case No. 151.

Second. The provisions of the treaty of Buffalo Creek of 1838, whereby the Tuscaroras sold to Ogden and Fellows a part (including the 1,920 acres) of their reservation and conveyed the balance to the United States in trust for sale on their account, were never followed by any surrender of possession by the Tuscaroras, or payment of the purchase-money by Ogden and Fellows, or any sale of any part of the reservation by the United States, and the Tuscaroras have continued to hold and occupy their entire reservation, as before described, ever since. The terms and conditions of the sale to Ogden and Fellows and the object and purpose of the same are set forth in article 14 of the treaty of 1838, and the form of the deed made and executed by the Tuscaroras is attached to the said treaty of 1838 and published therewith, to which reference is here made, and said article 14 and copy of the deeds thereto attached may be read by either party on the hearing.

Third. The Tonawanda band of the Senecas did not on the execution of the treaties of 1838 and 1842 surrender up the possession of their reservation to Ogden and Fellows under the provisions of the treaties of 1838 and 1842, and when the said Fellows and others proceeded to dispossess one of this band of a part of the reservation an action of trespass *quare clausum fregit* was brought by the Indian sought to be dispossessed and a judgment rendered in favor of the plaintiff therein in the supreme court of the State of New York, which judgment was affirmed by the court of appeals

of the State of New York, and on appeal to the Supreme Court of the United States the judgment of the court of appeals of the State of New York was affirmed, and the facts and circumstances of the case are stated and set forth in the case entitled Joseph Fellows, survivor of Robert Kendle, plaintiff in error, against Susan Blacksmith and Eli S. Parker, administrators of John Blacksmith, deceased.

This case is reported in the 19th of Howard, page 366; to which case, so reported, reference is made for the facts and circumstances of the case upon which the said several judgments were based.

Fourth. The Oneidas of New York sold and conveyed to the State of New York a further portion of their lands within the State, retaining 350 acres, upon which a portion of the Oneidas now reside, and in 1848 and prior thereto a large number of the said tribe removed to the State of Wisconsin and settled upon that portion of the Green Bay lands which have been occupied by others of the tribe prior to 1838 and which was excepted from the operation of article 1 of the treaty of 1838.

The opinion of the Court of Claims is printed in the record on pages 24 to 44. Conformably to its opinion, the Court of Claims dismissed the petition and the claimants duly appealed. (Rec., 45.)

II.

ASSIGNMENT OF ERROR.

The Court of Claims erred in dismissing the petition of the claimants.

III.

ARGUMENT.

1. The act under which the case was heard by the Court of Claims is set forth in full in the twelfth paragraph of the petition printed on pages 4 and 5 of the record.

The leading facts of the case are seen to be that at the time of the treaty of Buffalo Creek the New York Indians had an Indian title to 500,000 acres of land in the State of Wisconsin, on which a part of them at that time resided; that by the treaty of Buffalo Creek the New York Indians released their title to the Wisconsin lands and surrendered possession of the same to the United States, the latter granting to the Indians a reservation in the then Indian Territory, described by metes and bounds and containing 1,824,000 acres of land, and agreed that these lands should never be included in any State or Territory of the Union, and that the Government would appropriate the sum of $400,000 to be applied from time to time by the President to aid the claimants in removing to their new homes and supporting themselves the first year after removal, to encourage and assist them in being taught to cultivate their lands, to aid them in erecting mills and other necessary houses, and to aid them in purchasing domestic animals and farming utensils and acquiring a knowledge of the mechanic arts; that the President never prescribed any time for the Indians to remove, and that but few of them did remove, and those few so removed under the superintendence of an agent appointed by the Government; that of the sum of $400,000 above mentioned the United States never appropriated more than $20,477.50, and of this sum only $9,464.08 was actually expended; that the lands in the Indian Territory secured to the claimants by the treaty of Buffalo Creek were actually set apart by the United States and designated upon the land maps thereof as the New York Indian reserva-

tion and so remained until the year 1860, when the Government surveyed the lands and made them a part of the public domain, and afterwards sold and disposed of them, receiving the entire consideration therefor; that the said lands thereafter were and now are included within the territorial limits of the State of Kansas; that the action of the Government in appropriating the lands was in pursuance of proclamations of the President of December 3 and 17, 1860, and grew out of an order of the Secretary of the Interior of March 21, 1859, and between the last-mentioned date and the proclamation of the lands as a part of the public domain the claimants employed counsel to protect and prosecute their claims in the premises, asserting that the United States had seized the lands contrary to the obligation of the treaty and would not permit the claimants to occupy the same or make any disposition thereof, and the claimants have steadily since asserted their claims in the premises; that more than five years after the proclamation of the treaty, namely, on November 5, 1857, the United States, by treaty with the Tonawanda band of Senecas, numbering 650 individuals, in consideration of the release by that band of its claims upon the United States to the lands in the Indian Territory and of all right and claim to be removed thither, and for support and assistance after removal, and all other claims against the United States under the treaty of Buffalo Creek, agreed to pay and invest, and did pay and invest, for said band the sum of $256,000, which payment and investment amounted in substance to compensating the members of the band at the rate of one dollar per acre for their claims to the Kansas lands under the treaty, and also their proportionate share of the sum of $400,000 aforesaid according to the schedule in the treaty, and that a portion of the fund thus paid and invested was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation, in New York, for the benefit of that band, and the Tonawandas still reside thereon; and that there was evidence

before the Court of Claims tending to show that at the time the Kansas lands were opened to settlement they had a value greater than the price received for them by the United States.

2. The ground upon which the Court of Claims dismissed the petition is expressed in the following paragraph of the opinion (Rec., 42):

"Upon the whole case, it appears to us that the Indians did not desire to go to Kansas; that the United States did not wish to enforce an emigration, and both parties remained quiescent until the Government decided to appropriate the Kansas lands and to sell it to white settlers. When this had been done the defendants, by their own act, became unable to fulfill any financial obligations imposed upon them by the treaty of Buffalo Creek; but, as the Indians had no wish that these obligations should be fulfilled—on the contrary, were much averse to their fulfilment and preferred the then existing situation—no damage to either side can be said to have been inflicted. This conclusion, if it be correct, eliminates the treaty of 1838 from the discussion and brings us to a consideration of the relations and obligations of the parties prior to the conclusion of that agreement."

And again in the following language (Rec., 41):

"The Buffalo Creek treaty has vanished, leaving no rights or duties behind it, in so far as this litigation is concerned."

It is to be observed that the Court does not rest its decision in terms upon a forfeiture by the claimants of their rights under the treaty. On the contrary, the Court in its opinion (Rec., 35) distinctly finds that there was no forfeiture; and if the United States were disposed to assert a forfeiture it is confidently submitted that under the act conferring jurisdiction upon the Court of Claims and the pleadings, consisting of the petition and a general traverse, no such question could arise. Indeed, the Court by its opinion clearly shows that it did not consider such question to be involved in the

case, but fell back upon an assumed vanishing or elimination or abandonment of the treaty.

In this connection, it is appropriate to consider the forfeiture clause of the treaty. The entire argument for the United States in the court below rested upon counsel's interpretation of article 3 of the treaty of Buffalo Creek, which provides that—

> " It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes *within five years, or such other time as the President may from time to time appoint,* shall forfeit all interest in the lands so set apart to the United States."

The contention was that this limits the right of the Indians to remove to the Kansas lands to five years " *unless* " *the President shall have extended the time by affirmative action.*

The claimant's contention is, on the other hand, that under article 3 there could have been no forfeiture within the specified *minimum period of five years,* and if the Indians had not removed at the end of this period their rights would continue " *until* " *the President fixed a time, by affirmative action, beyond which their right to remove should not extend, and that they could only forfeit these lands after positive notification by the President that their refusal to remove by a specified date would work such forfeiture ;* and it may be added that even this notification must have been supported by a showing that the United States had performed every duty prescribed by the treaty and had made all necessary provisions for such removal.

That this is the correct interpretation of article 3, we submit, is clearly established by the well-known rule of construction that where words are used in one place with a definitely fixed meaning and similar words subsequently

appear in provisions *in pari materia* they are to receive the same interpretation.

Reiche *vs.* Smythe, 13 Wall., 162.

In the recital, beginning in line 23 of the preamble to this treaty of Buffalo Creek (7 Stat., 550), we find an expression similar to that under discussion used in speaking of the treaty between the Menomonees and the United States of February 8, 1831 (7 Stat., 342), as amended on February 17, 1831 (7 Stat., 346), and assented to by the New York Indians October 27, 1832 (7 Stat., 400), the language being as follows:

"And whereas by the provisions of that treaty five hundred thousand acres of land are secured to the New York Indians of the Six Nations and St. Regis tribe as a future home on condition that they all remove to the same *within three years or such reasonable time as the President should prescribe.*"

The expression "*within five years or such reasonable time as the President may from time to time appoint,*" found in article 3, is certainly used as the equivalent of the expression "*within three years or such reasonable time as the President should prescribe*" found in the preamble, with only the change from three to five. But this expression, as used in the preamble, is given a fixed and definite meaning by a reference to the treaty of February 8, 1831, as amended on February 17, 1831. This treaty as originally drafted limited the time of removal absolutely to three years from its date. (See language used near the end of first article, on page 343 of 7 Statutes.) This, however, was changed by the first amendment adopted on February 17, 1831 (see page 347 of 7 Statutes), whereby it is provided that the President shall prescribe the time for the removal, and that if the Indians shall refuse to remove *within such reasonable time* as the President shall prescribe for that purpose the lands are

to go to the United States, and it was as thus amended that the New York Indians gave their assent to it. (7 Statutes, 409.)

An examination of the treaty referred to thus demonstrates that the expression "*within three years or such reasonable time as the President should prescribe,*" used in the preamble, had the fixed and fully defined meaning that "*until*" *the President fixed a time by affirmative action* the rights of the Indians continued. When thus we find language so similar used in article 3 of the treaty, surely "it was intended it should receive the same interpretation" (13 Wall., 162–'5). Certainly that was "how the words of the treaty were understood by this unlettered people," and this "should form the rule of construction."

Choctaw Nation *vs.* United States, 119 U. S., pp. 27 and 28.

This view of the meaning of article 3 destroys the force of the argument for the United States deduced from the Senate resolutions; for even those resolutions might be read into the treaty (which on familiar principles is impossible), and still *the right of the President* to "retain a proper proportion of said sum of $400,000" and to "deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave each emigrant 320 acres" (Rec., 16, 17) *would only arise when the Indians had lost their right to remove.*

3. The assumed vanishing, elimination, or abandonment of the treaty will not stand examination.

Although in its opinion (Rec., 44) the Court of Claims says there "is no reason to apply in this case with any strictness the general principles governing the relations of guardian and ward, which usually much affect the decision of cases between the Indian tribes and the Government," it is earnestly submitted that these principles are of the first importance in considering the case. Abandonment can be

predicated only of the conduct of a party *sui juris*, and it is the uniform holding of every department of the Government that the Indian tribes are not and never were *sui juris*, except to the limited extent of having power to make the sort of treaty which until the act of Congress of March 3, 1871 (R. S., 2079), was the unbroken principle of the Government in dealing with the Indians. It is and always has been held by every department of the Government that the Indian tribes are the wards of the nation, and it is a misuse of language and an abuse of legal principle to say that a guardian can claim abandonment of any right by his ward, especially so long as the relation of guardian and ward exists. The language of this Court in the case of the Choctaw nation is peculiarly appropriate here:

"These Indian tribes are the wards of the nation; they are communities dependent on the United States—dependent largely for their daily bread, dependent for their political rights. They owe no allegiance to the States and receive from them no protection; because of the local ill feeling the people of the States where they are found are often their deadliest enemies. From the very weakness and helplessness so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised there arises the duty of protection and with it the power. This has always been recognized by the Executive, by Congress, and by this Court whenever the question has arisen. . . .

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as

their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws."

Moreover, no importance whatever is to be attached to the protests and objections of certain of the Indians to the ratification and carrying out of the treaty of Buffalo Creek. It is the plain fact that after the fullest consideration and in due form of law the United States, through its treaty-making power, assented to and proclaimed the treaty and it thereupon became the law of the land. No more attention can properly be paid to the alleged behavior of the Indians in the premises than could be paid to the preliminary negotiations to a fully formulated and executed contract between individuals. It matters not that some of the Indians protested against the ratification of the treaty, and it is most significant that the Senate recognized the opposition of the Seneca tribe and specifically withheld ratification of the treaty until it was able to say by solemn resolution that the treaty had been assented to by all the Indians. The Senate's resolution was (Rec., 17), "That whenever the President of the United States shall be satisfied that the assent of the Seneca tribe of Indians has been given" to the treaty the President was recommended to "make proclamation of said treaty and carry the same into effect;" and in his proclamation, already referred to (Rec., 18), the President quotes the further resolution of the Senate that in its opinion the treaty and its amendments "have been satisfactorily acceded to and approved of by said tribes, the Seneca tribe included."

This puts the case thus: The treaty was negotiated; it was objected to in certain particulars by certain of the In-

dians; the Senate considered the treaty and these objections and amended the treaty; the Senate withheld ratification of the treaty until all its provisions, including the amendments, should be ratified and approved by all of the Indians; the Senate solemnly declared that the treaty had been so assented to by all the Indians, the Seneca tribe included; and the President thereafter proclaimed the treaty thus assented to and solemnly ratified it as the law of the land. It would seem that any further argument on this point would involve worse than a waste of time.

4. The treaty being thus clearly established as the law of the land and the measure of the reciprocal rights and duties of the claimants and the Government in the premises, it remains to consider whether the claimants are entitled to the rights they assert.

The treaty of Buffalo Creek (with its supplement of 1842, which, however, does not affect the claim under consideration) and the mutual duties of the United States and the Indians thereunder have been twice considered by this Court, and this Court has spoken on the subject with no uncertain sound:

"Neither treaty made any provision as to the mode or manner in which the removal of the Indians . . . was to take place. . . .

"The removal of tribes and nations of Indians from their ancient possessions to their new homes in the West under the treaties made with them by the United States have been, according to the usage and practice of the Government, by its authority and under its care and superintendence.

"The negotiations with them as a *quasi* nation possessing some of the attributes of an independent people, and to be dealt with accordingly, would seem to lead to the conclusion, unless otherwise expressly stipulated, that the treaty was to be carried into execution by the authority or powers of the Government, which was a party to it, and more especially when made with a tribe of Indians who are in a state of pupilage and hold the relation to the Government as a ward to his guardian. . . .

"The treaty of 1838 contemplated a removal to the tract west of the State of Missouri and putting the Indians in possession of it. A large fund was appropriated and in the hands of the Government, to be disbursed in aid of such removal and of their support and encouragement after their arrival. It did not, therefore, separate those Indians from the care and protection of the Government on its ratification, but contemplated further duties towards them, and for which means were supplied. . . .

"We hold that the performance [of the conditions of the treaty] was not a duty that belonged to the grantees, but to the Government under the treaty.

"Fellows *vs.* Blacksmith, 19 Howard, 366."

On the second occasion when the treaty was under consideration by the Court its language was:

"This Court have decided in the case of Fellows *vs.* Blacksmith, 19th Howard, 366, that this treaty has made no provision as to the mode or manner in which the removal of the Indians . . . was to take place; that it can be carried into execution only by the authority or power of the Government, which was a party to it. The Indians are to be removed to their new homes by their guardian, the United States."

New York *vs.* Dibble, 21 Howard, 371.

These decisions of this Court would seem to be to put it beyond the question that, the duty of the Government not having been performed, the case is wholly without any feature in respect of which loss of their rights by the claimants can be asserted. It being the duty of the Government to do a given thing until the doing of which no such obligation on the part of the claimants as is assumed could be asserted, and the Government not having done that thing, the relations between the claimants and the Government have never reached the point at which any dereliction on the part of the claimants could be charged. This also seems too plain for further notice.

5. In addition, the Government by the Tonawanda treaty, made seventeen years after the proclamation of the treaty of Buffalo Creek, clearly recognized its obligations under the latter treaty.

Referring to the Tonawanda treaty, the Court of Claims in its opinion says:

"It is argued in substance that the payment by authority of Congress of a considerable sum of money to the Tonawanda tribe involves some admission by the defendants of plaintiffs' position and is, in effect, an acknowledgment of a right which would lead to plaintiffs' recovery in this cause.

"Legislative action is not necessarily a precedent for judicial action, for the legislature has a different quality of responsibility and power from the courts. The Congress may correct injustice in a manner entirely without judicial jurisdiction, and this right it often exercises. We, however, are limited in this case to the grant of jurisdiction given by the special act. Beyond that we can in no event go. If that act fail to give us sufficient power to remedy a wrong (if one has been done) and to remedy it by judicial method, recourse must again be had to the legislature.

"The Tonawanda appropriation may have a bearing upon the construction of the jurisdictional act if that act be obscure, but it does not necessarily show that because the Congress believes the Tonawandas deserve indemnity therefore the other tribes did so equally deserve it. Such an inference is, indeed, negatived by the fact that the Congress, while compensating the Tonawandas, failed to make any payment to the plaintiffs herein and sent them twice to this Court (under different grants of jurisdiction) to prosecute their alleged rights—all this long after the Tonawanda appropriation had been made. The different action of the Congress in the two cases (this case and that of the Tonawandas) shows that body to have been convinced that the Tonawandas were injured and not to have been convinced that these plantiffs were injured. As to that the Congress preserved an 'open mind.' In the solution of that question they have invoked judicial aid."

It is earnestly insisted that the Court misconceived the meaning and effect of the Tonawanda treaty and has given

to the action of Government in that respect a bearing wholly inconsistent with the purposes and manner of the Government in dealing with the matter. It is no argument to say that because the Government recognized and discharged its obligations to part of the Indians therefore it meant to say or to imply that the Indians thus dealt with were the only Indians recognized by Congress as entitled to rights in the premises. It is notorious that the Government is not in the habit of discharging all its duties in a given matter at one and the same time. Because out of a given number of claimants the Government selects a few and meets their claims it does not follow that the claims of the remainder are discarded. In fact, the action of Congress and the President in referring to the Court of Claims the claims asserted by the present claimants is an indication that Congress recognized force in the claims and referred them to that Court for adjudication. The position taken by the Court in its opinion is in effect this: that Congress by its successive action in the premises has stated at one time that the claimants have no rights, and at another, "We will refer to the Court of Claims for adjudication the very rights which we deny."

It is the plain truth that the Tonawandas had no claim upon the Government such as was discharged by the Tonawanda treaty, except such as grew out of the treaty of Buffalo Creek, and that the rights of the Tonawandas to consideration at the hands of the Government were greatly less than those of the present claimants. As stated by the Court of Claims itself (Rec., 32), when the case of Fellows *vs.* Blacksmith was before this Court, an objection was taken on the argument to the validity of the treaty of Buffalo Creek, on the ground that the Tonawanda band was not represented in the negotiation and execution of that treaty; but this Court held that the treaty, having been executed and ratified by the proper authorities of the Government, had become the supreme law of the land, and the courts could no more

go behind it for the purpose of annulling its effect and operation than they could go behind an act of Congress.

Fellows *vs.* Blacksmith, 19 Howard, p. 372.

It is to be observed that the decision in the case of Fellows *vs.* Blacksmith was rendered by this Court in 1856, and that the Tonawanda treaty was made in November of the next year; conclusive evidence, it would seem, that Congress acquiesced in the view of this Court, and began making amends for the dereliction of the Government by compensating the Tonawandas. Why Congress went no further is manifestly to be attributed to the conditions existing in the country at the time. The country was in the beginning of the troubles which led to the familiar condition of things in Kansas just prior to the outbreak of the civil war, and it is within the bounds of propriety to say that the seizure by the Government of the Kansas lands of the claimants was a part of the now familiar scheme to utilize land in that section in furtherance of well-known political plans. The act of the Secretary of the Interior in 1859 in seizing the Kansas lands has a meaning so clear in the light of our history that "he who runs may read;" and, of course, in the face of the action of the Executive Department of the Government and the claims of the New York Indians growing therefrom, Congress stayed its hand, and ensuing occurrences put out of the question indefinitely any consideration of the rights of the other Indians than the Tonawandas in the premises.

But the Tonawanda treaty is not the only evidence that Congress recognized the rights of the claimants as subsisting. Those rights are recognized in the sundry civil bill of March 3, 1859. Section 11 of that act (11 Stats., 430, 431) authorizes the issuing of patents for land by the Secretary of the Interior to certain Indians in Kansas; but expressly adds:

"*Provided*, That nothing herein contained shall be construed to apply to the New York Indians or to affect their

rights under the treaty made by them in 1838 at Buffalo Creek."

And again in the Kansas-Nebraska act, by which the Territory of Kansas was erected (10 Stats., p. 284), Congress, on May 30, 1854, defined the limits of the new Territory, and after giving the boundary lines, which include the New York Indian lands, Congress said:

"*Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any Territory, which by treaty with any Indian tribe, is not, without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory; but all such Territory shall be excepted out of the boundaries and constitute no part of the Territory of Kansas until said tribes shall signify their assent to the President of the United States to be included within the said Territory of Kansas."

The thirty-seventh section of the same act (p. 290) provides—

"That all treaties, laws, and other engagements made by the Government of the United States with the Indian tribes inhabiting the Territories embraced within this act shall be faithfully and rigidly observed, notwithstanding anything contained in this act."

May 4, 1858 (11 Stats., 259), Congress passed an enabling act for the admission of Kansas into the Union as a State, putting it to the vote of the people whether they should come into the Union.

May 3, 1859 (11 Stats., 430, 431), Congress expressly declared—

"That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians are entitled to separate selections of land and to a patent therefor under guards, re-

strictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians and their heirs, upon such conditions and limitations and under such guards or restrictions as may be prescribed by said Secretary: *Provided*, That nothing herein contained shall be construed to apply to the New York Indians or to affect their rights under the treaty made by them in 1838 at Buffalo Creek."

This, it will be observed, was eighteen days before Secretary Thompson threw the New York Indians' Kansas lands into the public domain, a year and six months after the treaty with the Tonawandas, and three years after this Court had in effect declared that there had been no forfeiture of the lands by the New York Indians.

Finally, January 29, 1861 (12 Stats., 126), Congress passed the act admitting Kansas into the Union as a State, and in so doing it changed the boundaries of the State so as to make them approximately a rectangle, but still including the lands of the New York Indians. That act contains this provision:

"*Provided*, That nothing contained in the said Constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any Territory which by treaty with such Indian tribes is not, without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory; that all such Territory shall be excepted out of the boundaries and constitute no part of the State of Kansas until said tribes shall signify their assent to the President of the United States to be included within said State."

And especially is it shown by the facts set out in Finding XVIII (Rec. 21), both that emigration was not essential to the rights of the claimants now asserted, and that Congress explicitly recognized such to be the case. That finding

shows that, without regard so emigration or removal, Congress actually paid *in New York* certain of the sums and discharged certain of the obligations provided for by the treaty. This alone would seem conclusive of the question of forfeiture *vel non*.

6. It is conceded that the treaty of Buffalo Creek operated a grant *in presenti* to the New York Indians of the Kansas lands.

What the law of forfeiture in such a case is, is now too familiar to require extended citation. This Court, without a single qualification from first to last, has said that where there is a condition subsequent in a grant that grant cannot possibly be taken away for failure to perform the condition subsequent unless and until there is some judicial proceeding in the nature of office found, or unless and until there is a legislative act of a competent body declaring the forfeiture. It is sufficient to refer on this point to the well-known case of Shulenberg *vs.* Harriman, 21 Wallace, p. 63.

If to what is there said there be added the consideration already mentioned, that the Indians are not *sui juris*, but are the wards of the nation, the principle enunciated by the Court is given peculiar force and application.

7. As the court below dismissed the petition, it of course did not go into the question of the respective rights of the different claimants. Assuming that in case of a reversal this Court will either itself render such a judgment as will define these respective rights, or that it will, in remanding the case to the Court of Claims, give that court proper direction in the premises, the question will be here considered.

In view of the fact that in settling with the Tonawanda band the Government assumed a valuation of the Kansas lands at $1 per foot, and the Court of Claims reports evidence tending to show that the lands at the time they were

thrown into the public domain were worth more than that sum, it is manifestly impossible to state any account between the Government and the claimants for consideration on this hearing, except on the assumption that the value per acre be considered at $1. The claimants earnestly contend that this sum is too small, but appreciate the fact that because the testimony is not before the Court it cannot fix a different sum. It is therefore submitted that in case of reversal the most that can be done by this Court at this time is to remand the case to the Court of Claims, with instructions as to the manner of stating the account. In the view of the claimants the account should be stated on the following principle:

From the 1,824,000 acres of land granted by the treaty should be deducted the 10,240 acres allowed to members of the Hogeboom party and the 208,000 acres estimated for in the Tonawanda treaty, leaving a remainder of 1,605,760 acres. These should be compensated for at their proper value at the time they were opened to settlement, which value there is evidence to show was greater than the price received for them by the United States (Rec., 22, Finding XX). The claimants should be allowed the removal and maintenance sum of $400,000, less the sum of $48,000 paid the Tonawandas on account thereof, being the sum of $352,000. The claimants should be allowed the sums agreed by the treaty to be paid in cash to separate tribes and individuals of the claimants, amounting to $18,500, and also to the income of the amounts agreed to be invested for the Cayugas and Onondagas, being respectively $2,000 and $2,500, from the date of the proclamation of the treaty, or, at least, from the throwing open of the lands to settlement. The claimants should be charged with the sum of $12,625, being the aggregate of the amounts paid to tribes and individuals, as set forth in Finding XVIII (Rec., 21), and also with the sum of $9,797.11 expended, as shown by the same finding.

Argument is unnecessary to establish the right to allowance for the 1,605,760 acres of land if the claimants have any rights at all in the premises.

The several sums agreed to be paid in cash to the separate tribes of the claimants, aggregating $18,500, are clearly to be allowed as sums agreed to be paid by the Government, but not paid, notwithstanding that the Government received the full consideration in return for which said sums were to be paid, in addition to the discharge of the other obligations assumed by the Government under the treaty.

The several sums claimed as income on sums on which the Government agreed to pay income are as clearly to be allowed, because, if the Government had paid the income as agreed, the aggregate thereof at simple interest and without rests would reach only the sum now claimed. Clearly the claimants are as entitled to these sums as to the principal sums agreed to be paid and for the same reason, namely, that they form part of the consideration for which the Indians ceded their lands.

The $400,000 stipulated to be appropriated by the United States for the benefit of the claimants by the fifteenth article should be allowed in full, less the sum of $48,000 paid the Tonawanda band under the treaty of 1857.

This sum was agreed upon as the money consideration to be paid the claimants for the release of their title to the Wisconsin lands, for it is stated in the second article that the relinquishment of title was in consideration of the facts recited in the preamble of the treaty and of the covenants contained in the other articles to be kept and performed by the United States.

The purposes for which the money was to be applied under the direction of the President were all beneficial to the claimants and related to the improvement of their lands, to the establishment of their new homes, and for educational purposes.

If it should be suggested that as the Indians have not re-

moved the expense of removal should be deducted, a complete answer to the same is that the Indians were to be removed at their own expense under the guidance of the Government, and if the United States advanced any part of the cost it would have been properly deducted from the sum of $400,000.

The Indians, in their tribal capacity, were not impecunious people; they were farmers living on productive lands, which supplied their family wants, and they also possessed other sources of income, which were ample to meet the expenses of removal. It is reasonable to suppose that they, like other immigrants to a new country in a like condition, would do so in the most prudent and least expensive manner.

It is very proper to assume that before any considerable number of any tribe removed they would dispose of their respective reservations, which were of large value and would supply them with ample means to defray the necessary disbursements for transportation. In case of removal they had the undoubted option to meet all disbursements from either source at their command, and if they did not call on the United States for an advancement to aid in removal the $400,000 would remain to be devoted to the other uses mentioned in the fifteenth article.

In any view which can be taken of the provisions of this article, the fact remains that the covenant to appropriate $400,000 remains unexecuted, except by the payment of $48,000 to the Tonawanda band under the treaty of 1857.

Yielding to the full force of the provision that the United States, acting through the President, could in a measure dictate to which of the uses mentioned in the article the $400,000 should be applied, the use designated would be beneficial to the Indians and would tend to enrich their estates and increase the value of their lands.

We have, then, a case similar in all material respects to that of a vendor of land who had contracted, on delivery of

possession of the premises to the vendee, at his own expense to erect houses, mills, and other buildings thereon, and also to supply teams, farm implements, etc., at a cost not exceeding a sum named, and then failing to deed the lands or to perform his other covenants.

The law in such a case determines the rule of damages arising from non-performance on the basis which we claim should be adopted to secure full indemnity to the claimants.

Respectfully submitted.

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